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NOTE AND COMMENT.

PROVABILITY IN BANKRUPTCY OF CLAIMS ARISING OUT OF ALIMONY DECREES OR SEPARATION AGREEMENTS BETWEEN HUSBAND AND WIFE.—It was not until the decisions in *Audubon* v. *Shufeldt*, 181 U. S. 575, and *Wetmore* v. *Markoe*, 196 U. S. 68, that it was authoritatively determined in this country that alimony, whether in arrears at the time of filing petition, or payable in the future, was not provable in bankruptcy. In the first case it was pointed out that an alimony allowance is generally alterable in the discretion of the court entering the original order; but the real basis of the decision appears to have been that "permanent alimony is to be regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt." In the second case it appeared that by the law of New York in which State the alimony judgment involved had been entered, the allowance was unalterable, and it was urged that the *Audubon* case, therefore, should not be considered controlling. The court held squarely that alimony, even though evidenced by an unalterable judgment, was not a *debt* within the Bankruptcy Act. The English courts have taken the same position as to the provability of alimony claims. *Linton* v. *Linton* (1885), 15 Q. B. D. 239; *Hawkins* v.

Hawkins [1894], 1 Q. B. 25; *Watkins* v. *Watkins* [1896], Prob. 222; *Kerr* v. *Kerr* [1897], 2 Q. B. 439.

In *Dunbar* v. *Dunbar,* 190 U. S. 340, the court had under consideration the liability of the defendant to the plaintiff, his divorced wife, upon a contract entered into between them after a divorce, but pursuant to a pre-divorce agreement, by which contract the defendant obligated himself to pay the plaintiff a certain sum annually during her life or widowhood and also a certain sum for the support of their two children. The defendant had pleaded and proved in defense, his discharge in bankruptcy. It appeared that plaintiff had filed a claim for the amount due her at the time the petition was filed, but whether she had received a dividend is not clear. The court *decided* that the contract as to the plaintiff's personal claim was not provable, hence not discharged, because the contingency of her remarrying could not be accurately measured. However Mr. Justice PECKHAM, who wrote the opinion, after referring to the rule as to alimony claims as laid down in *Audubon* v. *Shufeldt, supra,* said: "We are not by any means clear that the same principle ought not to govern a contract of this nature when, although the judgment of divorce is silent upon the subject, it is plain that the contract was made with reference to the obligations of the husband to aid in the support of the wife, notwithstanding the decree." As to the sums contracted to be paid for the maintenance of the children the court held that the contract did not create or evidence a *debt,* but was merely a recognition of the father's common-law liability to support his minor children, and so that part of the claim was also held not to have been discharged.

In *Victor* v. *Victor* [1912], 1 K. B. 247, the Court of Appeal held that by the husband's discharge in bankruptcy, he was relieved of all liability, past, present, and future, for the payment of an annuity to his wife, the annuity having been provided for in a separation agreement entered into by the parties sometime prior to the husband's bankruptcy. The annuity in this case was to cease in case the parties resumed cohabitation. The court held, following the extremely liberal English doctrine as to the allowance of contingent claims, discussed in *Hardy* v. *Fothergill,* 13 App. Cas. 351, that the contingency of the parties resuming cohabitation did not render the claim incapable of estimation and proof. In the *Victor* case the judges distinguish *Linton* v. *Linton, supra,* which held an alimony order unaffected by the former husband's bankruptcy discharge, on the ground that an alimony order is subject to change at any time. It is rather odd that a court which has held that the contingency of parties resuming cohabitation, the contingency of a divorced woman remarrying, the contingency of a divorced woman not remaining chaste, (*Ex parte Neal,* L. R. 14 Ch. D. 579) are capable of measurement should balk when it comes to estimating the chances that a court will change an alimony order.

In 1903 § 17 of the Federal Bankruptcy Act was amended so as to except from the operation of a discharge in bankruptcy liabilities "for alimony due or to become due, or for maintenance or support of wife or child." This amendment became effective after the decision in the *Audubon* case and after the rights of the parties in the *Dunbar* and *Wetmore* cases had become fixed. So in this country, at the present time, there could be no basis for a

contention that a discharge in bankruptcy operated to relieve the bankrupt from an obligation of the sort considered in *Victor* v. *Victor, supra.* However it does not seem necessarily settled that such a contract with the element of contingency eliminated may not be made the basis of a *provable* claim. The Supreme Court, as above noted, in the *Dunbar* case suggested that perhaps such a contract should be considered as on the same basis as an alimony order, but the decision as to the non-provability of the wife's claim was based on its contingency. A case might very easily arise where it would be very unfortunate for the wife, or former wife, if she were not permitted to prove her claim, especially as to the sums in arrears. In the alimony cases the court held that such claims were not provable even as to arrearages, but in the *Dunbar* case, in which it was a contract that was the basis of the claim, that question was not passed upon. R. W. A.

THE SCOPE AND FUNCTION OF THE FEDERAL EMPLOYER'S LIABILITY ACT.—Three cases, arising under the Federal Employer's Liability Act, (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1909, p. 1171), and the amendment of April 5th, 1910, (36 Stat. at L. 291, chap. 143), were disposed of in a single opinion by the United States Supreme Court. In relation to the liability of interstate carriers by railroad for injuries incurred by railroad employees while engaged in interstate commerce, the statute abolishes the fellow-servant doctrine and the doctrine of assumption of risk, and it modifies the application of the doctrine of contributory negligence by the introduction of the rule of comparative negligence. The constitutionality of this statute was questioned. *Held,*—1st, that Congress, in the exercise of its power over interstate commerce, may regulate the relation of common carriers by railroad and their employees while both are engaged in such commerce; 2nd, that Congress did not exceed its power in that regard by prescribing the regulations which are embodied in the act in question; 3rd, that those regulations supersede the laws of the States in so far as the latter cover the same field; 4th, that rights arising under those regulations may be enforced, as of right, in the courts of the States, when their jurisdiction, as fixed by the local laws, is adequate to the occasion. *Mondou* v. *New York, N. H. & H. R. Co.* (1912), 32 Sup. Ct. 169.

Congress has the power to regulate the relation of master and servant as far as such relations are confined solely to interstate commerce. *Employer's Liability Cases,* 207 U. S. 463, 495; *Southern Ry. Co.* v. *United States,* 222 U. S. 20. (See note, 10 MICH. L. REV. 212.) As was said in the last above-named case, the power of Congress "to regulate interstate commerce is plenary, and competently may be exerted to secure the safety * * * of those who are employed in such transportation, no matter what may be the source of the danger which threatens it."

The doctrine of comparative negligence originated in Illinois, (see *Galena etc. R. Co.* v. *Jacobs,* 20 Ill. 478), but has since been overruled, (see *Penn. Coal Co.* v. *Kelly,* 156 Ill. 9). According to this doctrine, the employee's negligence, which contributed to his injuries, must be compared with that of his employer in determining the measure of his damages. GEORGIA CODE, 1895,